No. 20427

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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LOCAL UNION NO. 11, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

*Appellant,*

*vs.*

G. P. THOMPSON ELECTRIC, INC.,

*Appellee.*



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## BRIEF FOR APPELLEE.

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### Jurisdictional Statement.

This action involves proceedings to confirm and to vacate an arbitration award under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). The proceeding was commenced in the Superior Court of the State of California. Appellee removed the action to the United States District Court for the Southern District of California by virtue of 28 U.S.C. § 1441(b). The District Court had original jurisdiction, 28 U.S.C. § 1337 and 29 U.S.C. § 185(a). An appeal was filed [R. 95] and the jurisdiction of this court rests on 28 U.S.C. § 1291.

### Statement of the Case.

Appellant commenced this proceeding in the Superior Court for the State of California to enforce an arbitration award. The award, among other things, required

appellee to make payments into two trust funds. Through the state court enforcement proceeding appellant sought a money judgment against appellee in the amount allegedly owing into the trust funds. California Code of Civil Procedure, Section 1287.4; *Los Angeles Local Joint Executive Board of Culinary Workers and Bartenders, AFL v. Stan's Drive Ins, Inc.,* 136 Cal. App. 2d 95 (1955)

The proceeding was then removed by Appellee to the United States District Court pursuant to the provisions of 28 U.S.C. § 1441.

Appellee then petitioned to vacate that portion of the award requiring payment into the trust funds on the ground that the claims there asserted by appellant were claims which existed in favor of appellant and against appellee at the time of a prior action between the parties[1] and that they had been waived by appellant's failure to assert them in the prior action as required by Rule 13(a) of the Federal Rules of Civil Procedure.

The Court below vacated the portion of the award pertaining to the trust fund payments on this ground.

The sole issue on this appeal is whether the claims for the payment of money into the trust funds, on which appellant seeks a money judgment in this proceeding, were compulsory counterclaims which appellant waived by failing to assert them in the prior action between the parties. There appear to be no appellate decisions directly answering this question.

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[1] *Auten v. Local Union No. 11* in which appellee was a plaintiff and appellant was defendant.

## Summary of Argument.

The appellant had a claim arising from the same transaction or occurrence litigated in a prior action between the parties. Though the claim might have been asserted through arbitration proceeding, it was required to be asserted in the prior action under the *rationale* of the recent arbitration requirement cases, the Federal Rules of Civil Procedure and the Labor Management Relations Act. Appellant was authorized by the collective bargaining agreement, the Labor Management Relations Act and common principles of law to assert such claims in the prior action. The claims are no less claims in a court of law, than at an arbitration proceeding. The requirements of the recent federal cases to process claims through arbitration before going to a court of law arise only in the context of some party objecting to the prosecution of the action in court, and do not include instances when a federal rule of procedure of long standing must be sacrificed to encourage dilatory tactics on the part of appellant.

## I.

## The Union Had a Claim That Arose From the Same Occurrence or Transaction Litigated in a Prior Case and Was a Compulsory Counterclaim in That Case.

It is appellee's position, and the trial court found, that the claims upon which appellant now seeks a money judgment were claims which have been waived by appellant's failure to assert them in the prior proceeding.

It is apparently appellant's position that there could be no claim until an arbitration decision was rendered. Appellant states that since arbitration was required, the

recent Supreme Court cases would not allow an action on the claims[2] in Federal Court.[3] Thus, appellant argues it had no claim to assert in the prior proceeding. The first great weakness in this argument is that it fails to consider the purposes and rationale of the very decisions upon which appellant relies. The second great weakness in this argument is that it fails to consider the purposes and rationale of Rule 13(a), of the Federal Rules of Civil Procedure.

Absent an arbitration provision, the appellant could have commenced an action in the District Court for its claim for moneys due.[4]

The purpose of the salutory recent rulings regarding submission to arbitration, when the dispute is arbitrable, is to prevent industrial strife.[5] Arbitration, appellee agrees is a desirable thing. Arbitration is not always an end in itself. This very cause commenced as an action to confirm an arbitration award under Section 301(a) LMRA.[6] The rationale of the arbitration requirement cases is for rapid, effective settlement of disputes. This,

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[2]Appellant, one assumes, would admit to having a claim to be arbitrated; even if that claim is not a claim, by appellant's reasoning, for all purposes.

[3]*Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965); *Drake Bakeries, Inc. v. Local 50, American Bakery Workers,* 370 U.S. 254 (1962); *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960). Of course the rule applies as well to unions' failure to arbitrate, *Bonnot v. Congress of Independent Unions,* 331 F. 2d 355 (8th Cir. 1964).

[4]Section 301, Labor Management Relations Act. Appellant argues that only the trustees of the respective trust funds could have brought the action for the claim. That contention is, of course, without merit, and is answered in II, p. 9, *infra.*

[5]Arbitration is the substitute for industrial strife." *United Steelworkers of America, AFL-CIO v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 578 (1960).

[6]See also 9 U.S.C. §9.

unfortunately, is not always the case, since the arbitration decisions often require court enforcement, thus unavoidably prolonging the dispute.

If a lessening of court confrontations and speedy disposition of disputes will lead to industrial harmony, surely the principles behind Rule 13(a) take on even more force. A long-standing federal rule, now embodied in Rule 13(a), is designed to eliminate multiplicity of lawsuits and bring about speedy disposition of the litigant's claims. As the Second Circuit stated in *United States v. Eastport Steamship Corporation*, 255 F. 2d 795, 805 (2d Cir. 1958):

> "The underlying purpose of the rule is to force disposition in one action of all claims which have arisen between the parties to that litigation [citation omitted]. To accomplish this purpose claims not otherwise suable in a Federal Court are compelled to be the subject of a counterclaim to a cause of action properly brought in a Federal Court [citation omitted]. And also whenever a compulsory counterclaim is not pleaded in an action when it should have been pleaded the judgment entered in that action is clearly *res judicata* as to the merits of the unpleaded counterclaim. Ancillary jurisdiction is necessary to make the rule universal. The *res judicata* result is necessary to make the rule effective. Not otherwise would multiplicity of suits be avoided." (255 F. 2d at 805).

See also *Southern Construction Co. v. United States*, 371 U.S. 57, 60 (1962). In *Union Paving Co. v. Downer Corp.*, 276 F. 2d 468 (9th Cir. 1960) this court stated:

> "If a party fails to plead these causes of action as counterclaims, he is held to have waived them

> and is precluded by res judicata from ever suing on them again [citations omitted]. The apparent purpose of such compulsion is to prevent a multiplicity of lawsuits." (276 F. 2d at 470).

The policies involved in both the recent arbitration decisions and Rule 13(a) of the Federal Rules of Civil Procedure, argue for a lessening of litigation and speedy determination of issues affecting and disrupting industrial harmony. This case is one of first impression; but the issue is fairly stated as whether an over-technical following of the arbitration decisions should be allowed to defeat the purpose of those decisions and destroy a part of a long-standing federal rule of procedure. The court below reasoned that the national labor policies were best served by requiring a speedy disposition of all the issues in a given transaction at the first opportunity.

This court in a labor matter has applied Rule 13(a) to penalize dilatory tactics on the part of a labor union. In *Brotherhood of Locomotive F. & E. v. Butte, A. & P. Ry. Co.,* 286 F. 2d 706 (9th Cir. 1961), cert. den. 366 U.S. 929, the railroad announced that work previously done by members of the Brotherhood of Locomotive Firemen & Engineers would be done by employees of the parent corporation, Anaconda Company, represented by the International Union of Mine, Mill and Smelter Workers. The brotherhood issued a strike notice. The railway's injunction forbidding the strike, granted by a Montana State court, was dissolved, after removal to the United States District Court, by that court. The District Court action was upheld on appeal, 268 F. 2d 54, cert. den. 361 U.S. 864. However, before oral argument in the appeal, the International Union and

its local obtained a restraining order from a Montana State court which prohibited Anaconda Company from assigning the work in question to members of the Brotherhood.

The Brotherhood then sought restoration of the *status quo ante* by filing a supplemental answer and counterclaim in the United States District Court, District of Montana. This court held in affirming the trial court:

> "The 'restoration' claim arises out of the same transaction as the claim for an injunction, and it would not require for its adjudication the presence of any third party over whom the court would be unable to acquire jurisdiction. Such a claim must, under Rule 13(a), be included in the original pleading; if it is not, it is lost and cannot later be asserted." (286 F. 2d at 709-710.)

This court was sound in reasoning that the speedy disposition of such claims by unions must be decided at the earliest opportunity.

Appellant does not argue that the claim not asserted was not from the same transaction or occurrence. There is no doubt that it was.[7] *Auten v. Local 11, IBEW*, Case No. 64-1670-JWC, 58 LRRM 2531 (1965) determined the validity of the funds and employer payment requirements into the funds in question, and, of course, the claim not asserted until this cause is for those same

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[7]The requirement is: "a very definite logical relationship between the counterclaim and main action and . . . consequently both claims must be deemed to have arisen from the same transaction or occurrence." *Union Paving Co. v. Downer Corp.*, 276 F. 2d at 470. See also *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926).

payments. In short, one is hard-pressed to conceive a more logical relationship.[8]

A careful examination of the decisions relied on by appellant for the proposition that the arbitration provisions of a collective bargaining agreement must be adhered to reveal no such case as ours. This is *not* a question of commencing a cause in the Federal Courts before arbitration is had, but rather complying with the mandate of Rule 13(a) of the Federal Rules in a cause already before the court so as to avoid multiplicity of litigation. The union cannot deny that there are now two lawsuits where one would have sufficed, and virtually the same issues have been litigated twice.

The cases relied upon by appellant arise in the context of a party atttmpting to by-pass the arbitration table followed by an objection by the other party or parties concerned. No case has gone so far as to require arbitration when there is no objection from any party. Present a duty to counterclaim under the Federal rules, and absent any objection to such speedy disposition of the dispute the cases relied upon by appellant lose their force and reason.

The parties may waive an arbitration provision, *American Locomotive Co. v. Gyro Process, et al.,* 185 F. 2d 316 (6th Cir. 1950), so it can hardly follow that no civil action mayzbe brought under § 301(a), LMRA absent arbitration, else any action at all might be precluded.

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[8]It is unquestioned that a suit contesting the validity of an insurance policy requires a counterclaim for the benefits thereunder, Federal Rules of Civil Procedure § 13(a), *Aetna Life Insurance Co. v. Little Rock Basket Co.,* 14 FRD 381 (E.D. Ark. 1953), *Union Central Life Ins. Co. v. Burger,* 27 F. Supp. 554 (S.D.N.Y. 1939), 3 Moore Federal Practice § 13.13 (2d Ed. 1964).

It is absurd to argue that there was no "claim." It would be a triumph of form over substance to hold that the only "claim" was to go to arbitration. The arbitration process was merely the manner in which appellant erroneously chose to assert its "claim." In the usual case, postponement of the litigation until the claim is arbitrated is required by court decisions. This is not the usual case and Federal Rule 13(a) should overcome the general line of cases, and be applied by this court. *Hancock Oil Co. v. Universal Oil Products Co.*, 115 F. 2d 45 (9th Cir. 1940). To do so, would support the reasoning of both the arbitration cases and Section 13(a) of the Federal Rules of Civil Procedure.

## II.

## The Union Could Have Filed Counterclaims for Payments by the Employer to the Respective Trust Funds in the United States District Court.

Article VII, Section 2 of the collective bargaining agreement [R. 18] reads in part:

> "Collection actions may be brought by the Trustees of the Fund in the name of the fund. . . ."

The word "may" hardly can be read to limit the action, so as to exclude the union from bringing a suit in Federal Court when Section 301(a) LMRA specifically authorizes such a suit.[9] If the trustees chose not to sue, the union might under § 301, LMRA. It is strange indeed to find a representative of employees so willing to cast off the duties and obligations of that representation!

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[9] "May" is, of course, discretionary, *People v. Durbin*, 218 Cal. App. 2d 846 (1963).

Appellant's argument is inane in view of the *Auten* case. There the employer *et al.* sued the union regarding these very trusts. The union, at that time, was not moved to raise the issue of whether the trustees were an indispensable party, Rule 19, Federal Rules of Civil Procedure. The union can hardly argue now that it ought not to have defended when it did. This action concerns a dontract between the union and this employer, plain and simple. The union has defended the prior action without the trustees. The union proceeded to arbitration without the trustees. The union has petitioned for enforcement of the arbitration award without the trustees.

If petitioning for enforcement is not enforcing a legal claim; what is it? Yet, the union avers it could not enter court outright to enforce a legal claim for moneys due the trustee. The answer perhaps is best summed up, by merely saying it has done it, and it is authorized to do it; but it did not do it, when it could have,[10] and should have.[11]

## III.

## Conclusion.

For the reasons stated above appellee requests this court to affirm the entire decision of the District Court below.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON,

DAVID A. MADDUX,

*Attorneys for Appellee.*

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[10] § 301(a) LMRA.

[11] Federal Rules of Civil Procedure § 13(a).

## Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. MADDUX